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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 231

UNITED STATES OF AMERICA EX REL. HAROLD E. HIRSHBERG, PETITIONER

v.

CAPTAIN WILLIAM R. COOKE, JR., UNITED STATES NAVY, COMMANDING OFFICER, UNITED STATES NAVAL RECEIVING STATION, BROOKLYN, NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the district court (R. 200-212) is reported at 73 F. Supp. 990. The majority and dissenting opinions in the Court of Appeals (R. 223-227, 254-264) are reported at 168 F. 2d 503.

JURISDICTION

The judgment of the Court of Appeals was entered April 9, 1948 (R. 228), and a petition for

rehearing (R. 229-241) was denied June 2, 1948 (R. 264). The petition for a writ of certiorari was filed August 17, 1948, and was granted October 18, 1948 (R. 265). The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended (now 28 U.S.C. 1254(1)).

QUESTION PRESENTED

Whether a legally constituted naval court martial has jurisdiction to try a chief petty officer in the Navy for a violation of the Articles for the Government of the Navy committed during a prior enlistment, where that enlistment was terminated by an honorable discharge and was followed by reenlistment on the following day.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 48-51.

STATEMENT

The facts are not in dispute and may be summarized as follows:

On March 24, 1936, petitioner enlisted in the Navy for the period of his minority, or until May 18, 1939 (R. 38, 110, 117). On November 8, 1939,[1] being then at Canton, China, on board the

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[1] The record indicates that from April 11, 1939, to November 8, 1939, petitioner was aboard the U.S.S. *Mindanao* (R. 121), but does not clearly indicate the nature of his status after May 18, 1939, when his minority terminated. Presumably he extended his enlistment for an indefinite period after the latter date (cf. R. 38-39). In any event, the point has no materiality in this case.

U.S.S. *Mindanao,* he extended his enlistment for two years (R. 38-39, 121). When the enlistment expired, on November 7, 1941, he was stationed at Cavite, in the Philippine Islands (R. 125). He was then honorably discharged, and, on the same day, he reenlisted for four years (R. 39-40, 125). He was promoted regularly during his service, and on February 23, 1942, attained the chief petty officer rating of Chief Signalman (R. 125).

When the United States forces on Corregidor surrendered, in May 1942, petitioner became a prisoner of war of the Japanese, and remained such a prisoner for over three years, until he was liberated in September 1945 (R. 125). Thereafter he passed through various naval hospitals, and on March 26, 1946, while on duty with the Permanent Shore Patrol, Third Naval District, New York City, he received an honorable discharge by reason of the termination of his enlistment, effective at midnight of that day (R. 41, 127).

The honorable discharge (Resp. Ex. A, R. 145) was issued by a lieutenant-commander, the executive officer of the Permanent Shore Patrol, by direction. Such discharges "are not issued by the Bureau of Naval Personnel but are issued by the commanding officer of the man concerned pursuant to administrative instructions contained in the Bureau of Naval Personnel Manual" (Rel. Ex. 5, R. 129).

Petitioner reenlisted in the Navy for four years on the afternoon of the following day, March 27, 1946 (R. 41, 127). This reenlistment did "not require prior reference to the Bureau of Naval Personnel before being effected," and petitioner "suffered no break * * * in entitlement to pay and allowances due him for his naval service and he continued to be entitled to full pay and allowances as though he had not been discharged" (Rel. Ex. 5, R. 129). Similarly, by virtue of his immediate reenlistment, petitioner secured all the benefits of continuous service "in counting time for longevity pay increases * * *, transfer to the Fleet Reserve and retirement" (*ibid.*).[2]

On February 24, 1947, petitioner was served with charges dated February 12, 1947, directing his trial by a general court-martial convened by the Commandant of the Third Naval District (R. 63; Rel. Ex. 7, R. 134-141). The charges embraced nine specifications, all setting forth offenses alleged to have been committed while petitioner was a Japanese prisoner of war, between November 10, 1942, and March 1, 1944. Petitioner was tried by general court-martial between July 21 and August 12, 1947 (R. 100). He was acquitted of seven of the specifications and convicted of two, namely, maltreating persons subject to his orders,

[2] Likewise, petitioner's "Continuous Service Certificate" (Rel. Ex. 3, R. 117-127) indicates continuous service from the date of his first enlistment, on March 24, 1936, to February 21, 1947, the last date entered in it.

to wit, two other naval enlisted men who were Japanese prisoners of war and members of a work section in petitioner's charge (R. 100-101, 134-135, 136), in violation of Article 8 (Second) of the Articles for the Government of the Navy (Appendix, *infra*, p. 48). Petitioner was sentenced to 10 months' confinement, to reduction to the rating of apprentice seaman, and to dishonorable discharge from the Navy (R. 101).

On August 29, 1947, the convening authority approved the findings and sentence (Rel. Ex. 1, R. 100-109). Citing, *inter alia*, Section 334 of *Naval Courts and Boards* (1937 ed.) (See *infra*, p. 28), the convening authority discussed and rejected petitioner's contention that the court-martial had no jurisdiction over the offenses of which he was convicted by reason of the fact that they were committed during a prior enlistment from which he had been honorably discharged (R. 104-107).

The petition for a writ of habeas corpus (R. 7-21), which gave rise to the present proceeding, was filed in the District Court for the Eastern District of New York on August 18, 1947 (R. 1). The petition, so far as is now pertinent,[3] challenged the jurisdiction of the court-martial to

[3] The jurisdiction of the court-martial was also challenged on the ground that petitioner was a prisoner of war when his offenses were committed and hence not amenable to United States naval jurisdiction for such offenses (R. 10-11). This ground, rejected by both courts below (R. 203-204, 224-225), was abandoned by petitioner in this Court.

try petitioner for offenses allegedly committed during a prior enlistment from which he had received an honorable discharge (R. 8-9). The writ issued (R. 5-6), a return was made (R. 22-23) and traversed (R. 24-26), and, following a hearing at which petitioner testified (R. 30-99), the district court filed an order (R. 27-29) and opinion (R. 200-212) sustaining the writ and directing petitioner's discharge from custody. On appeal by respondent, the Court of Appeals for the Second Circuit, one judge dissenting (R. 227), reversed the order of the district court with directions to dismiss the writ and remand petitioner to respondent's custody (R. 228). On rehearing, the Court of Appeals adhered to its original views in a supplementary opinion (R. 254-256). The dissenting judge likewise adhered to his conclusions, but in a new opinion (R. 256-264).

SUMMARY OF ARGUMENT

Petitioner's trial by a Navy court-martial was authorized by Article 8 of the Articles for the Government of the Navy in that he was a "person in the Navy" both when the offenses were committed and when he was tried. The fact that petitioner had received an honorable discharge from the enlistment in which the offenses had been committed and had immediately reenlisted did not terminate petitioner's liability to trial by court-martial. If petitioner had not reenlisted, he would not have been subject to trial by court-

martial; it may be inferred from AGN 14, which extends court-martial jurisdiction to civilians for certain offenses committed while in the naval service, that there is no jurisdiction to try by court-martial *civilians* who while in the service committed offenses other than those specified in AGN 14. However, it does not follow from AGN 14 that a court-martial lacks jurisdiction to try a man who has reenlisted for an offense committed during a prior enlistment.

Typically, the Navy enlisted man who reenlists is a career sailor. For him, the expiration of an enlistment does not mark the end of naval status and the beginning of civilian status which are so significant in drawing a line between naval and civil jurisdiction. In relation to the date of an offense, the expiration of his enlistment is a purely fortuitous event, having none of the rationale of a period of limitations (AGN 61). Naval discipline and justice are not served by making court-martial jurisdiction over persons with substantially continuous naval service depend upon such accidental circumstances. This case also illustrates that under the Articles for the Government of the Navy a court-martial has jurisdiction territorially over some crimes which are without the jurisdiction of any civil court; if petitioner cannot be tried by a Navy court-martial for his offenses, he apparently cannot be tried by any court.

From 1921 to 1932, and after considerable doubt, the Navy took the position that a court-martial was without jurisdiction to try an enlisted man for an offense committed during a prior enlistment. From 1932 to the present time, the Navy has repeatedly and publicly asserted such jurisdiction. During neither of these periods did Congress make any pertinent change in the Articles for the Government of the Navy. However, the 1922 decision in *Ex parte Foly*, 290 Fed. 858, apparently revived the Navy's earlier doubts and led to the reversal of its position. While it is true that administrative failure to assert jurisdiction has been regarded as evidence of a lack of jurisdiction under an ambiguous statute, this principle of construction is not applicable where, as here, the statute literally read confers jurisdiction and a contrary interpretation would produce impractical and anomalous results.

Similarly, the Army's long-standing view that a military court-martial lacks jurisdiction in the circumstances of this case, is not persuasive. The Army's rule, like the Navy's original view, appears to be based upon an erroneous inference drawn from AW 94 (which is equivalent to AGN 14). Furthermore, the Army has departed from its general rule to the extent, for example, that it holds that jurisdiction survives where two enlistments are separated by a discharge for the convenience of the government, but does not survive

where two enlistments are separated by an honorable discharge.

Petitioner's contention that his honorable discharge from the enlistment in which his offenses were committed precludes his trial by court-martial in a subsequent enlistment, finds no support in the statutes or in judicial decisions. Since an honorable discharge which has been obtained by fraud may be revoked, it is difficult to understand why such a discharge should have the effect of a pardon for undetected crimes and a shorter period of limitations with respect to a sailor remaining in the naval service. Similarly, since an honorable discharge does not bar prosecution in a civil court for an offense committed during that enlistment which is a violation of both civil and naval law, there is no reason for precluding trial for the offense by a court-martial having personal jurisdiction over the offender, particularly since the offense may have caused detriment only to naval discipline. Also, as this case illustrates, the modern discharge procedure is routine, with the discharge often being signed by an officer whose knowledge of the sailor's conduct is derived solely from his formal record. Under these circumstances, it is entirely unrealistic to view an honorable discharge as a "formal final judgment" "upon the entire [naval] record of the [sailor]" which cuts off an otherwise admitted amenability to trial by court-martial.

ARGUMENT

I

The Navy Court-Martial Had Jurisdiction to Try Petitioner for an Offense Committed During a Prior Enlistment

A. *AGN 8 (Second) by its terms conferred jurisdiction in this case, and nothing in AGN 14 (Eleventh) requires a contrary conclusion.*

The Navy's assertion of court-martial jurisdiction over the petitioner is entirely consistent with the Constitution and the Articles for the Government of the Navy. The Constitution empowers Congress "to make rules for the government and regulation of the land and naval forces", and provides that the rights of indictment by grand jury and trial by jury shall not apply to "cases arising in the land or naval forces." Constitution, Art. I, sec. 8(14); Fifth Amendment; *Ex parte Milligan*, 4 Wall. 2, 138-139; *Ex parte Quirin*, 317 U. S. 1, 40. Pursuant to this power, Congress has provided in AGN 8 that "Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy" who commits any of enumerated offenses including those of which petitioner was found guilty.

Here petitioner was in the Navy both at the time of the offenses and at the time of his trial by a Navy court-martial. His naval service between those dates was continuous except for an interval of a few hours between his honorable dis-

charge from the enlistment which he was serving at the time of the offenses, and his reenlistment. Thus, this case does not involve trial of civilians or of camp-followers by military tribunals, nor any question as to when an individual ceases to be a civilian through entrance into the service or resumes civilian status by leaving the service, nor the statutory extension of court-martial jurisdiction over civilians who were formerly in the service, in respect of frauds committed against the Government in their military or naval status, by virtue of AGN 14 (Eleventh), *infra*, pp. 48-49, or of AW 94 (10 U.S.C. 1566). Petitioner here was not a civilian; he was in the Navy when the offenses charged against him were committed, and when he was tried; and he does not now question his naval status at either of these periods.

Petitioner does not deny that he was tried by a legally constituted court martial with jurisdiction over him and over offenses of the type with which he was charged. Instead, he asserts that there is no jurisdiction to try him for these particular offenses committed in a prior enlistment. His reasoning is that Congress has provided that court-martial jurisdiction shall survive discharge from the service only with respect to the fraud-type offenses specified in AGN 14 (and AW 94); that from this specific provision it must be inferred that court-martial jurisdiction as to all other offenses is terminated by discharge; and that since

if petitioner had remained a civilian after his discharge, the court martial would have lacked jurisdiction, it must be assumed that Congress intended that a court-martial would lack jurisdiction if he reenlisted.

At this point, it should be noted that nothing in the Constitutional provisions quoted above convey the slightest intimation that court-martial jurisdiction over offenses committed by a member of the armed forces must terminate when the offender ceases to be a member of the armed forces. The authority vested in Congress "to make rules for the government and regulation of the land and naval forces" surely embraces the power to provide for the trial under such "rules" of offenses against such rules by a soldier or sailor who has since left the service. Surely, such cases involving the trial by court-martial of a former sailor or soldier for offenses committed while in the service are "cases arising in the land or naval forces" within the meaning of the Fifth Amendment. At any rate, such was the understanding of Congress in 1863, when it provided in what is now AGN 14 that:

> * * * if any person, being guilty of any of the offenses described in this article while in the naval service, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by court-martial, in the same manner and to the same extent as if he had

not received such discharge nor been dismissed.

This limited statutory extension of court-martial jurisdiction to a former sailor or soldier who has returned permanently or indefinitely to civilian status has been repeatedly sustained by the courts. *In re Bogart,* 2 Sawy. 396, Fed. Case No. 1596 (C.C.D. Cal.); *Ex parte Joly,* 290 Fed. 858 (S.D. N.Y.); *Terry* v. *United States,* 2 F. Supp. 962 (W.D. Wash.); *United States ex. rel. Marino* v. *Hildreth,* 61 F. Supp. 667 (E.D. N.Y.); cf. *United States ex rel. Flannery* v. *Commanding General,* 69 F. Supp. 661 (S.D. N.Y.).[4] Similarly, it is established that where the jurisdiction of a court-martial attaches by the commencement of a proceeding, it is not defeated by the subsequent expiration of the enlistment and the offender remains subject to trial by court-martial and to punishment in accordance with naval (or military) law. *Carter* v. *McClaughry,* 183 U.S. 365, 383; *Hironimus* v. *Durant,* 168 F. 2d 288 (C.A. 4), certiorari denied October 11, 1948, No. 119, 1948 Term.

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[4] It is interesting to note that the British Naval Discipline Act, Articles of War, 46, provides for the trial and punishment of offenses committed by any person while subject to that Act although the offender has ceased to be subject to the Act; any proceeding must be brought within three months after the offender has ceased to be subject to the Act except for mutiny or desertion. 12 & 13 Geo. 5, c. 37. A similar provision is contained in Section 158 of the Army and Air Force (Annual) Act (See War Office, *Manual of Military Law* (1939) p. 564).

While no constitutional issue as to the scope of court-martial jurisdiction is raised in this case, the constitutional setting is relevant to the Congressional purpose as to the scope of the Articles for the Government of the Navy. Since Congress was free under the Constitution to extend the AGN to petitioner's situation, there is no reason to infer that it did not do so where the statutory language is literally applicable and where the contrary result would be impractical and incongruous.

AGN 8 (Second) (Appendix *infra*, p. 48) provides that such punishment as a court-martial may adjudge may be inflicted on "any person in the Navy" found guilty of "cruelty toward or oppression or maltreatment of, any person subject to his orders." Since petitioner was concededly a "person in the Navy" both when the offenses in question were committed and when he was tried, it is clear that this Article, literally construed, conferred jurisdiction on the court-martial to try petitioner for those offenses, as petitioner candidly concedes (Br. 10).[4a]

It is true that AGN 14 (Eleventh) (Appendix, *infra*, p. 49), provides that "if any person, be-

[4a] Petitioner states that "this broad provision is subject to limitations" and he mentions two (Br. 10). The first—that it "does not apply to an offense committed by the accused while a civilian prior to his entry into the Naval service"—is not, of course, a limitation at all, since it is perfectly clear from the context of AGN 8 that the person must be in the Navy at the time of commission of the offenses described to be subject to the punishment provided for. The other limitation mentioned by petitioner begs the question presented by this case.

ing guilty of any of the offenses described in this article while in the naval service, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed." Concededly, the implication of this provision is that the power thus conferred is limited to the particular offenses described in AGN 14. But that power is the power to reach out to persons who have completely severed their connection with the Navy and permanently resumed civilian status, and bring them to trial by court-martial notwithstanding such severance and permanent resumption of civilian status. In other words, AGN 14 empowers the Navy to try *civilians* by court-martial for specified offenses, and it may be assumed by implication that the Navy is without power to try *civilians* for offenses other than those specified in AGN 14. But here the Navy is not subjecting a civilian to trial by court-martial, for petitioner was in the Navy when he was tried for offenses committed while he was in the Navy. As recognized by both the majority and dissenting judges below, whatever negative inferences are to be drawn from AGN 14 are irrelevant to this case (R. 226, 259).

B. *Every practical consideration supports the jurisdiction of a Navy court-martial to try petitioner for offenses committed during an earlier enlistment.*

As noted above, the precise issue here is whether the Navy retains jurisdiction, subject to the statute of limitations in AGN 61, to try by court-martial enlisted men whose service between the offense and the trial is substantially continuous, notwithstanding that in the interval one period of enlistment has terminated and another begun.[5]

For the man who leaves the Naval service to return to civilian status, the expiration of his enlistment is a legally significant event, because thereafter as a civilian he may not be subjected to trial by court-martial except for the offenses specified in AGN 14. On the other hand, for the man who is making his career in the Navy, the expiration of his current enlistment has no such significance; rather, it marks only an opportunity to leave the Naval service if he so desires and, assuming he does not so desire, his right to a reenlistment gratuity under 37 U.S.C. 110.

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[5] A note in the British *Manual of Military Law*, p. 565, commenting on Section 158 of the Army and Air Force (Annual) Act, *supra*, p. 13, fn. 4, states that, "When the three months have once expired, the offender is protected, and his liability is not revived by his again becoming subject to military law." The inference is that if he reenlists within three months, i.e., so that his service is substantially continuous, he again becomes subject to trial by court-martial for offenses committed during the prior enlistment.

Furthermore, the date of the expiration of an enlistment is entirely fortuitous in relation to the date of an offense against Naval law. At the present time, for example, enlistments in the Navy may be for terms of two, three, four, or six years, 34 U.S.C. 181, and reenlistments are for terms of three, four or six years at the option of the men concerned. Bureau of Naval Personnel Manual, par. D-1002. In addition, in time of war the Secretary of the Navy may extend periods of enlistments. Thus, the period of time between the commission of an offense and the expiration of the then current enlistment is accidental—with none of the rationale underlying a statute of limitations. To illustrate: if two sailors jointly commit an offense, and prior to the institution of court-martial proceedings the enlistment of one expires and he reenlists, then, if petitioner's view is correct, one is subject to trial by court-martial while the other is not.

For the career sailor, his enlistment is for most practical purposes an indefinite term which he expects to terminate by retirement after twenty or thirty years of service. It is a startling notion that the amenability of such a man to trial by court-martial is cut off not only by the two-year statute of limitations (AGN 61), reflecting the sound policy underlying such statutes, but also by the intervening circumstance of an expiration of enlistment which bears no relation to the

administration of justice or to the maintenance of naval discipline.

It is our view that court-martial jurisdiction over persons in the Naval service should not depend upon such vagaries of chance. It is true that if petitioner had not reenlisted following his discharge on March 26, 1947, the Navy would have been powerless to proceed against him for the offenses committed during his enlistment. (It is only in respect of the offenses described in AGN 14, as we have seen (*supra*, pp. 14-15), that the Navy can do that.) And this might be thought to pose a theoretical objection to concluding that, in consequence of his reenlistment, the Navy regained its power to punish him for his prior offenses. The difficulty evaporates, however, when the problem is fairly analyzed. The reason why the Navy cannot institute proceedings against a discharged person for offenses committed prior to discharge (except for AGN 14 offenses) is the fact that the person is *no longer in the Navy*. He is a civilian. The Navy, in other words, no longer has jurisdiction over his *person*. But when the discharged man reenlists, he re-subjects his person to the Navy's jurisdiction by his voluntary act. The mere fact that between the discharge from the prior enlistment and the reenlistment the Navy had no jurisdiction over the man's person in no way detracts from its continuing jurisdiction of the *offenses*.

There is nothing extraordinary, as petitioner suggests, in the notion that jurisdiction over the person may be suspended and later revived. As the court below noted, where a man commits a crime in Canada, escapes to the United States, and subsequently returns to Canada, it would hardly be denied that the Canadian court has jurisdiction to try him notwithstanding his intervening stay in the United States during which the Canadian court lacked jurisdiction over his person. Petitioner suggests, however, that because of the possibility of extraditing the offender from the United States to Canada, the analogy fails (Br. 13). But the possibility of extradition—a matter of international comity—is clearly an accidental feature. In other words, if we assume that the two countries do not have an extradition treaty, the analogy holds. And the same situation exists in our federal system—to the surprise of many offenders.

A further practical consideration is that petitioner is apparently not subject to trial by any civil court for the offenses for which he was tried by the Navy court-martial. Since section 102 of 28 U.S. Code, referred to by the dissenting judge below (R. 260) as conferring jurisdiction upon a federal court to try petitioner, is merely a venue provision, we must look to what is now section 7 [6] of

[6] The places described in this section are: "the high seas"; "any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State"; "any vessel" (on specified conditions); "any lands reserved or acquired for the use of the United

Title 18, U.S. Code for *civil* jurisdiction outside the United States proper over the assault and battery offenses (18 U.S.C., 1946 ed., 455, now 18 U.S.C. 113) of which petitioner was found guilty. It is at least doubtful whether that section confers jurisdiction upon federal civil courts over petitioner's offenses committed on *terra firma* in the Philippine Islands. Those offenses were committed in 1943 while petitioner was a member of the United States Navy, held as a prisoner of war in Japanese custody during the Japanese occupation of the Philippine Islands. It is likely that under these circumstances, and under accepted principles of international law he was not amenable to trial by any civil court in the Philippine Islands. *The Exchange*, 7 Cranch 116, 138-141; *Coleman* v. *Tennessee*, 97 U. S. 509; *Dow* v. *Johnson*, 100 U. S. 158. In any event, even if petitioner could have been brought to trial in a Philippine court, he would not have been entitled to trial by jury. *Dorr* v. *United States*, 195 U. S. 138; Constitution of the Philippines (1935), Art. III, Sec. 1(17) (30 Pub. Laws Phil. Is., pp. 372-373). Cf. dissenting opinion below, R. 260.

States, and under the exclusive or concurrent jurisdiction thereof"; "any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building"; and "any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States."

Consequently, we believe that the dissenting judge below was in error in assuming that petitioner could have been indicted and tried for his offenses in a civil court, and that a "waiver of the right to a jury trial" (R. 263) was here involved.

We do not, of course, suggest that it necessarily follows, from his lack of amenability to any kind of trial other than by court-martial, that he must have been subject to trial by court-martial after as well as before[7] his discharge and reenlistment. But the factor of non-amenability to any other kind of trial is, we submit, one that may properly be considered in resolving the legal question which this case presents. It is to be noted that there are other situations which are reached by the AGN but to which civil jurisdiction does not extend. *Rosborough* v. *Rossell*, 150 F. 2d 809 (C.A. 1), held that a Navy court-martial lacked jurisdiction to try a sailor for a murder committed in a foreign harbor aboard a foreign vessel to which he was assigned as part of the armed guard. Congress promptly amended AGN 6 to give jurisdiction to naval courts-martial over murder committed anywhere outside the territorial jurisdiction of any particular State or the District of Columbia. Act of December 4, 1945, 59 Stat. 595. Thus, since

[7] It is, of course, unquestioned that petitioner could have been tried by court-martial before the termination of the enlistment during which his offenses were committed, if those offenses had been detected in time.

Congress has been alert to extend the jurisdiction of naval courts-martial to offenses over which our civil courts lack jurisdiction, it would be incongruous simultaneously to construe court-martial jurisdiction so as to leave such serious crimes untriable by any American tribunal.

C. *Since jurisdiction to try petitioner by court-martial is authorized by statute and has been asserted by the Navy since 1932, the Navy's earlier interpretation or practice during a shorter period is immaterial.*

Petitioner's principal argument (Br. 22-26) and the main reliance of the dissenting judge below (R. 256-264), is that the Navy is bound by its earlier disclaimer of jurisdiction to try an enlisted man for an offense committed in a prior enlistment from which he had received an honorable discharge. The obvious infirmity of this contention is that the Navy's earlier rule finds no support in the statute. It is also noteworthy that the Navy adopted its earlier rule with doubts, persisted in it for only 11[8] years (not "for at least 70 years (1862-1932)" as stated by the dissenting judge below), and has adhered to its present view for the last 16 years.

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[8] See petitioner's candid concession that he is "unable to find any rulings [on this issue] prior to" 1917 (Br. 16, note 5). The 1917 ruling to which he refers, as we show in the text which follows, was not a ruling on the question at bar, so that the next succeeding ruling cited by petitioner—that in 1921—is actually the first ruling in point.

The first recorded instance in which the Navy Department had occasion to consider the question presented in this case was in what might be called a *dictum* contained in CMO 22-1917, pp. 7-8. Because of its interest as the first Navy Court-Martial Order considering the question, and also because it reflects the doubt then entertained by the Navy in respect of the problem, it is here reproduced *verbatim:*

> DISCHARGE: *Effect of, Upon Status of Enlisted Man Committing Subsequent Offense and Reenlisting.*
>
> A question was presented as to whether an enlisted man in the Navy is amenable to trial by court martial for an offense committed on the day of, but subsequent to the delivery of, his discharge from the naval service, the man in question having reenlisted on the day following his discharge. If the man in question was discharged for any cause other than expiration of enlistment, he was not in the naval service when his offense was committed and therefore could not be tried by court martial for said offense, notwithstanding his subsequent reenlistment. If, however, the man in question was discharged by reason of expiration of enlistment he was in the naval service when his offense was committed, his discharge not having become effective until midnight of that day. Notwithstanding his subsequent reenlistment on the day following, this man's connection with the Navy had been completely severed by discharge; although in

similar cases in the Army the view has been expressed that a subsequent reappointment or reenlistment into the Army would not revive the jurisdiction for past offenses, but that such jurisdiction would properly be considered as finally lapsed,[9] yet the question is not free from doubt, and should a case arise in which the interests of the service demand the trial of a reenlisted man for an offense committed in his previous enlistment, it is considered that the question of naval jurisdiction should be raised by bringing the offender to trial by court martial to the end that he might present the jurisdictional question to the civil courts by habeas corpus proceedings. If the offense is discovered and the accused is placed under arrest to await action before his discharge takes effect, the general rule is that when jurisdiction has thus attached the same is not divested by any subsequent change in the status of the accused (File 26504-298, J.A.G., Feb. 26, 1917).

It will be observed that, while that Court-Martial Order is somewhat obscure as to the precise question involved in it, the question apparently was whether there was jurisdiction of an offense committed "on the day of, but subsequent to the delivery of, [the enlisted man's] discharge from the naval service, the man in question having reenlisted on the day following his dis-

[9] See pp. 36-41, *infra*, for a discussion of the Army's views on this and related questions.

charge." Whether or not the offense was *committed* in the service was said to depend on the nature of the discharge, *i.e.*, whether it was by reason of expiration of enlistment or otherwise. If the discharge was for any cause other than expiration of enlistment, the decision states, it was effective immediately upon delivery of the discharge papers, so that the offense did not occur while the man was in the service. If, on the other hand, it was further said, the discharge was by reason of expiration of enlistment, it did not become effective until midnight of the day of the offense, with the consequence that the offense did occur while the man was in the service—*i.e.* during the earlier enlistment. The concluding portion of the Court-Martial Order appears to be a *dictum* discussing the man's amenability to court-martial trial under the latter hypothesis, but expressing no conclusion on the matter. Somewhat prophetically, it suggested that jurisdiction should be asserted in a proper case so that the question might be decided by the civil courts in a habeas corpus proceeding.

The first square holding by the Navy Department on the issue presented in this case appears in CMO 12-1921, p. 11,[10] and the ruling was that—

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[10] Petitioner, in stating that "The origins of the present [Navy] rule are found in a case which arose in the Navy in 1919. C.M.O. 237-1919, p. 22" (Br. 17), misreads the cited Court-Martial Order. That Court-Martial Order involved the question of the amenability to court-martial trial of a person who had been discharged from the Navy, for an

> Except in cases of offenses in violation of Article 14 of the Articles for the Government of the Navy, there is no authority of law giving jurisdiction to a court-martial to try an enlisted man for an offense committed in a prior enlistment from which he has an honorable discharge, regardless of the fact that he has subsequently reenlisted in the naval service and was serving under such reenlistment at the time the jurisdiction of the court was asserted. (File 26251-29077, J.A.G. 17 Dec. 1921.)

This ruling was followed in 1926 (CMO 1-1926, p. 9) and again in 1929 (CMO 12-1929, pp. 7-8), but was thereafter abandoned in 1932, so that the old Navy rule endured only 11 years—from 1921 to 1932.

Thereafter, the Navy Department sustained its jurisdiction in cases of this type. Sgt. Jacob G. Keller, USMC, GCM record No. 75740 (1932); Pvt. George C. Smith, USMC, GCM record No. 76425 (1934); M1c Archie L. Hammock, USN, GCM record No. 77457 (1936); CMM Everett W. Wyatt, USN, GCM record No. 78075 (1938).[11] The

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offense committed prior to discharge, where there had been no reenlistment or reappointment—obviously quite a different question from that at bar. Similarly, petitioner misreads the opinion of Attorney General Palmer in 34 Op. Atty. Gen. 521. Attorney General Palmer was not asked, nor did he consider, as stated by petitioner (Br. p. 17), whether a reenlisted man could be tried by a Navy court-martial for an offense committed during a prior enlistment; the sole question there presented was whether there was jurisdiction to try a sailor who had returned to civilian life and had *not* reenlisted.

[11] We are advised by the Office of the Judge Advocate General of the Navy that all of these cases were reviewed in

first two cases cited were the basis for Change No. 7 to *Naval Courts and Boards* (1923 ed.), promulgated August 16, 1934, as follows:

> Except for offenses provided for in that article [AGN 14], a court-martial may not try an individual who has been formally separated from the Navy and is no longer in the service (31 Op. Atty. Gen. 521; *Ex parte Wilson*, 33 Fed. (2d) 214) unless proceedings were instituted against him while he was in the service (31 Op. Atty. Gen. 521; C.M.O. 26-1917). However, if an officer reenters the service and his trial is not barred by the statute of limitations, it has been judicially decided that he may be tried by court-martial and punished for an offense committed during his previous service, whether or not the offense is one for which trial by court-martial after separation from the service is specifically authorized by statute (*Ex parte Joly*, 290 Fed. Rep. 858). Similarly, the Navy Department has passed cases as legal in which enlisted men have been convicted by court-martial of offenses committed in a previous enlistment, although such offenses were not provided for in Art. 14, A.G.N. (G.C.M. Rec. No. 75740, Feb. 1, 1933, and G.C.M. Rec. No. 76425, Apr. 4, 1934).

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the Navy Department by the Judge Advocate General. We are further advised that in the cases of Pvt. Smith (GCM Record No. 76425) and of CMM Wyatt (GCM record No. 78075), the Secretary of the Navy personally acted on the records of trial. Compare the dissenting judge's remarks at R. 258, note 7.

The first three cases cited were the basis for so much of Section 334(a) of *Naval Courts and Boards* (1937 ed.) as follows:

> * * * Except for offenses provided for in article 14, A.G.N., a court martial may not try an individual who has been formally separated from the Navy and is no longer in the service unless proceedings were instituted against him while he was in the service. However, if an officer reenters the service and his trial is not barred by the statute of limitations, it has been judicially decided that he may be tried by court martial and punished for an offense committed during his previous service, whether or not the offense is one for which trial by court martial after separation from the service is specifically authorized by statute. Similarly, the Navy Department has passed cases as legal in which enlisted men have been convicted by court martial of offenses committed in a previous enlistment, although such offenses were not provided for in article 14, A.G.N.

This view was thereafter formally reaffirmed in CMO 7-1938, p. 42. And the action of the convening authority in the present case (*supra*, p. 5) indicates that the Navy still adheres to its new ruling.[12] The lack of reported cases in the interval

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[12] In NAVAL JUSTICE (1945), p. 40, prepared by the Navy Department as a textbook on naval law, there is repeated the substance of Section 334(a) of *Naval Courts and Boards* (1937).

Further evidence of the Navy's understanding that under existing law a court-martial has jurisdiction in the instant case may be found in H.R. 3687 and S. 1338 (identical bills),

presumably reflects in large part the automatic extension of enlistments during the war. See 34 U.S.C. 186; ALNAV 155-41, dated December 15, 1941.

To summarize the history of the Navy's practice: Commencing in 1917, the Navy indicated that the question of jurisdiction here involved was doubtful, and it is clear that this doubt was largely engendered by awareness of the Army view that jurisdiction was destroyed by the expiration of an enlistment notwithstanding immediate reenlistment. Four years later, in 1921, it was declared flatly that jurisdiction was lacking, and this view was followed until at least 1929. Commencing in 1932, the Navy asserted jurisdiction. Between 1921 and 1932, Congress had made no pertinent change in the AGN. However, in 1922, *Ex parte Joly*, 290 Fed. 858 (S.D. N.Y.) held that an Army officer who had received an honorable discharge and had been immediately recommissioned, could be tried

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80th Cong., 1st Sess. (1947), containing proposals of the Navy Department for revision of the Articles for the Government of the Navy. Sec. 47 of both bills would have provided a new Article 5(a) defining the persons subject to the Articles as including "all persons on active duty in the naval service * * * and any such person alleged to have committed any offense against these Articles during a prior period of service." The quoted language would clearly give a court-martial jurisdiction over a person in petitioner's circumstances. However, in an accompanying letter of explanation dated May 22, 1947, and addressed by the Acting Secretary of the Navy to the Speaker of the House of Representatives, it is stated that Article 5(a) "consolidates existing law" with two stated exceptions not relevant to this case. This letter has been printed by the House Committee on Armed Services.

by court-martial for an offense (not enumerated in AW 94) committed during his earlier commission. This decision certainly cast doubt upon the often-repeated statement that "a subsequent re-appointment or re-enlistment into the army would not revive the jurisdiction for past offenses." Winthrop, *Military Law and Precedents* (1920), p. 93. In any event, *Ex parte Jöly* apparently revived the Navy's earlier doubts, for it is cited, in Change No. 7 (1934) to *Naval Courts and Boards* (1923 ed.), *supra*, p. 27, in support of the Navy's view that it has jurisdiction to try an enlisted man for an offense committed in a prior enlistment.

Since a literal interpretation of the Articles for the Government of the Navy gives jurisdiction to a court martial in these circumstances, and since every practical consideration supports such an interpretation, there is no basis for petitioner's contention that the Navy's earlier view that jurisdiction was lacking now controls the interpretation of the statute. Admittedly, Congressional acquiescence in a long-standing administrative interpretation, or reenactment of a statute after it has been interpreted by the agency charged with its administration, has often been regarded as evidence of Congressional approval or ratification of an otherwise doubtful construction of a statute. On the other hand, this Court has made it clear that a prior administrative interpretation of a statute, even after reenactment by Congress, is not neces-

sarily frozen into the statute, and may be superseded by a subsequent administrative interpretation based upon a more mature study of the problem. Cf. *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90. And it has also held that an administrative interpretation limiting the scope of a statute cannot prevail against the clear purpose of the statute. *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369.

Accordingly, we submit that the suggestion in *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, relied upon by petitioner (Br. p. 20) that a lack of statutory authority may be inferred from a prolonged failure to assert it, has no application here. There, "for a quarter century the Commission [had] made no such claim" that its stated powers with respect to interstate commerce included jurisdiction over intra-state transactions affecting commerce. (312 U. S. at 351-352). Here, for not more than 11 years the Navy followed, after doubts, the view that it lacked jurisdiction, and, a year after it adopted this view, its basis was undermined by *Ex parte Joly, supra.* Furthermore, the *Bunte* case recognized that "Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise" (at p. 352). Moreover, the decision in the *Bunte* case rested not only on administrative non-user, but also upon the refusal of Congress to amend the Federal Trade Commission Act so as to expressly

grant the power in question. Actually, the instant case is stronger than *United States* v. *American Union Transport*, 327 U. S. 437, 454-455, where this Court refused to infer a lack of statutory power merely from administrative failure to assert it. Here the Navy has affirmatively asserted court-martial jurisdiction in the circumstances of this case for 16 years (1932-1948).

Petitioner also argues that "During the years in which the Navy interpreted the AGN as not extending the court-martial jurisdiction to offenses committed during prior enlistments, the Congress made no move to change this interpretation by legislative enactment. * * * It is no novel principle that the silence of Congress in the face of a long-continued departmental practice or statutory construction may be tantamount to legislative consent to such practice or interpretation." (Br. 22-23.) Here, again, the argument boomerangs. For, neither has Congress amended the basic law to repudiate the Navy's later rulings, asserting jurisdiction, which, as we have shown, have endured for a longer period than its short-lived earlier interpretation. Whatever argumentative value there is to be found in Congress' inaction, therefore, must be claimed by respondent.

D. *The assertion in Section 334(a) of Naval Courts and Boards that a court martial has jurisdiction in the instant type of situation was binding upon all naval personnel.*

We do not understand petitioner's insistence that Section 334(a) of *Naval Courts and Boards* (1937 ed.) is not a "regulation" within the meaning of 34 U. S. C. 591.[13] It may be assumed that under that statute the "orders, regulations, and instructions issued by the Secretary of the Navy * * * with the approval of the President" must be consistent with the statutes, and cannot give to Navy courts-martial a jurisdiction which Congress has not conferred by the Articles for the Government of the Navy. If the Navy lacked authority under AGN 8 to try petitioner, it cannot be supplied by Section 334(a) of *Naval Courts and Boards* (1937 ed.). If there is jurisdiction under AGN 8, it is not lost by treating Section 334(a) as an "instruction" rather than a "regulation."

Our sole reliance upon Section 334(a) of *Naval Courts and Boards* is as evidence of the Navy's interpretation of the statute which it administers as giving jurisdiction to a court-martial in the instant type of situation. The majority of the

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[13] This statute is quoted in full in the Appendix, *infra*, p. 49. It provides in pertinent part that "The orders, regulations, *and instructions* issued by the Secretary of the Navy * * *, with the approval of the President, shall be recognized as the regulations of the Navy * * *." [Italics supplied.]

court below, on petition for rehearing, relied upon Section 334(a) only as such evidence.

Both Change No. 7 (1934) to *Naval Courts and Boards* (1923 ed.) and *Naval Courts and Boards* (1937 ed.) were issued by the Secretary of the Navy with the approval of the President. Petitioner appears to be contending that Section 334(a) is an "instruction", but not an "instruction" which under 34 U. S. C. 591 is part of "the regulations of the Navy." To the contrary, it may be stated categorically that *Naval Courts and Boards* (1937 ed.), including Section 334(a), is a "regulation" having the force of law (unless inconsistent with governing statutes) and would be so regarded by everyone in the Navy. *Ex parte Reed*, 100 U. S. 13. Article 74(1) of the *United States Navy Regulations, 1920*, as amended, makes the matter entirely clear by providing that "All general rules and regulations for the guidance of, and all other general orders and general instructions to, persons in the Naval Establishment shall be contained in" certain enumerated publications, among which is *Naval Courts and Boards*. Paragraph (3)(g) of Article 74 describes *Naval Courts and Boards* as containing "the instructions * * * governing the procedure of naval courts and boards," and adds that "The order promulgating this publication * * * shall be signed by the Secretary of the Navy and approved by the President of the United States." Finally, paragraph (4) states

that orders or instructions contained in *Naval Courts and Boards* (and the other official publications enumerated) "shall have full force and effect for the guidance of all persons in the Naval Establishment," and that any publications other than those enumerated "shall not have force and effect as regulations." Clearly, therefore, Section 334(a) of *Naval Courts and Boards* (1937 ed.), announcing to the service the Navy's changed interpretation of its jurisdiction to try enlisted men for offenses committed during previous enlistments was a Navy *instruction*, having by statute, and intended by the Navy to have, the force of law. In practice, *Naval Courts and Boards* is the Navy's legal "bible". It would not occur to anyone in the Naval service that the assertion of jurisdiction in Section 334(a) is anything other than a formal binding statement by the Navy Department that jurisdiction exists.

In brief, we contend that Change No. 7 to the 1923 edition of *Naval Courts and Boards* and Section 334(a) of the 1937 edition of *Naval Courts and Boards* constituted an authoritative public interpretation by the highest Navy authority that a court-martial has jurisdiction in the circumstances of this case. Such an assertion of jurisdiction in *Naval Courts and Boards* also has the result of removing from the instant case any suggestion of an *ex post facto* application. Petitioner reenlisted twice, in 1941 and again in 1946, after the new rule was announced to the service. In so far, therefore,

as enlistment is to be regarded as contractual (*In re Grimley*, 137 U. S. 147), the contracts which he made in 1941 and again in 1946, to "be subject to such laws, regulations and articles * * * as are or shall be established" (R. 114), contemplated a continued amenability to naval jurisdiction under the later enlistment for offenses committed but not discovered during the earlier one. Cf. *Great Northern Ry. v. Sunburst Co.*, 287 U. S. 358. It is entirely true, as pointed out by petitioner and the dissenting judge below, that copies of *Naval Courts and Boards* are not distributed to every officer and enlisted man. They are distributed to all ships and shore stations and are readily available to any officer or enlisted man. Any actual ignorance of petitioner as to the Navy's rule from 1934 on differs in no respect from the average citizen's general ignorance of the contents of Title 18 of the U. S. Code.

E. *The fact that the Army has always disclaimed jurisdiction to try an enlisted man for offenses committed during a prior enlistment is not persuasive, since the Army view has no better foundation than the earlier Navy practice.*

It is undisputed that for many years the Army has entertained the view that it lacks jurisdiction in the circumstances of the instant case. Thus in *A Manual for Courts-Martial* (1928 ed.), § 10, it is

laid down as the "general rule," to which exceptions are cited, that "court-martial jurisdiction over officers, cadets, soldiers, and others in the military service of the United States ceases on discharge or other separation from such service, and that jurisdiction as to an offense committed during a period of service thus terminated is not revived by a reentry into the military service." See also *Digest of Opinions of the Judge Advocate General* (1912), p. 515, par. VIII I 1b; Digest Op. JAG (1912-1940), sec. 369 (4).

Nothing in AW 2, which defines the persons subject to military law, even suggests that the Army lacks jurisdiction to try a soldier for an offense committed during a prior enlistment. In this respect, AW 2 is the same as AGN 8. AW 94 is identical with AGN 14 in that it specifies offenses sounding in fraud as to which the Army may try by court-martial offenders who have left the Army and returned to civilian status. We believe, although of course this is not clear, that the Army's disclaimer of jurisdiction in the instant type of situation is based upon the assumption that AW 94, by expressly extending court-martial jurisdiction to *civilians* for offenses committed while in military service, must be construed as forbidding trial of a *soldier* by a court-martial for an offense committed during a prior enlistment.

The origin of the Army's rule in such a construction of AW 94 is strongly indicated by a footnote

appended to the early statement of the rule in the 1912 edition of the *Digest of Opinions of the Judge-Advocates General* (*supra*, p. 37). In that footnote it is stated, "It is to be understood that the general rule of the nonamenability to military trial of officers and soldiers after discharge, dismissal, etc., for offenses committed prior thereto is subject to *a specific statutory exception, viz., that provided for in the concluding provision of the sixtieth* [14] *article* [of war]." [Italics supplied.] Added confirmation as to the probable origin of the rule is to be found in the following passage from 1 Winthrop, *Military Law and Precedents* (2d ed. 1896) 124:

> JURISDICTION AFTER A SECOND APPOINTMENT OR ENLISTMENT. It remains to refer to the effect, *per se*, of a subsequent appointment or enlistment of an officer or soldier, (once duly dismissed, resigned, &c., or discharged,) upon his amenability to trial for an offence committed prior to such discharge, &c., (and within two years,) but not yet made the subject of a charge or trial. Upon this point there is not known to have been any adjudication. *Putting out of the question the class of offences, the amenability for which is expressly defined by the 60th article, it is the opinion of the author that*, in separating in any legal form from the service an officer or soldier or consenting to his separation therefrom, and remanding him to the civil status at which the

[14] AW 94 was AW 60 prior to 1920.

> military jurisdiction properly terminates, the United States, (while it may of course continue to hold him liable for a pecuniary deficit,) must be deemed in law to waive the right to prosecute him before a court-martial for an offence previously committed but not brought to trial. *In this view, a subsequent re-appointment or re-enlistment into the army would not revive the jurisdiction for past offences, but the same would properly be considered as finally lapsed.* [Italics supplied.]

As we have already pointed out in connection with AGN 14, which is identical with AW 94, this express statutory extension of court-martial jurisdiction to civilians who committed specified offenses while in the military service, can support the negative implication that such persons cannot be tried by court-martial for any *other* offenses. It cannot support the inference that a court-martial lacks jurisdiction to try a person who is a soldier for an offense committed when he was a soldier.

Also, assuming the relevancy of Army practice, it should be noted that despite the tenacity of the Army rule in the specific type of situation here presented, the more recent Army rulings adopt the view that a change within an individual's military status is immaterial so long as his service is continuous or substantially so. See *A Manual for Courts-Martial* (1928 ed.), § 10, next to last paragraph. Thus it has been held that jurisdiction sur-

vives a change from contract surgeon to commissioned officer in the medical corps (Dig. Op. JAG (1912-1940), § 369(3), par. 1, citing decisions rendered in 1917 and 1918); from a commission in the United States Guards to one in the Infantry (*id.*, par. 3, citing a 1918 decision); from an emergency commission to a Regular commission, accepted the day following discharge from the previous commission (*id.*, par. 4, citing three decisions rendered in 1921); from a lower grade to a higher one, *i.e.*, promotion (*id.*, par. 5, citing a 1921 decision); from a higher grade to a lower grade, *i.e.*, statutory demotion followed by recommissioning (*id.*, par. 6, citing a 1923 decision); from West Point cadet to commissioned status (*id.*, par. 7, citing a 1935 decision); and from enlisted to commissioned status (*id.*, par. 2, citing a 1918 decision). Similarly it has been ruled that where a soldier's first enlistment is terminated by a discharge for the convenience of the Government, he may be tried in the later enlistment for offenses committed in the earlier. 1 Bull. JAG 13, § 369 (4), citing a 1939 decision. And there is an unpublished opinion to the effect that a soldier discharged in occupied territory to accept civilian employment with the American Military Government remains subject (as a civilian serving with the Army, within AW 2(d) to trial by court-martial for offenses committed while a soldier. (JAGJ 1947/1146, 24 Feb. 1947.[15]

[15] The only conflict in the rulings concerns reserve officers who commit offenses during one tour of active duty, and then

Thus, presumably in response to practical considerations and under the influence of *Ex parte Joly, supra,* the Army's disclaimer of jurisdiction in situations where the military service of the offender has been substantially continuous, is now limited to the situation where as here two enlistments are separated by an honorable discharge. As noted above, Army court-martial jurisdiction survives where two *commissions* are separated by an honorable discharge, *Ex parte Joly, supra,* and where two *enlistments* are separated by a discharge *for the convenience of the Government.* 1 Bull. JAG 13, § 369(4); yet jurisdiction is said to lapse where two *enlistments* are separated by an *honorable* discharge. Surely, this is a distinction without differences, unless an honorable discharge is to constitute a blanket pardon for or condonation of undetected offenses.

II

The Navy's Jurisdiction to Try Petitioner for Offenses Committed During a Prior Enlistment is not Defeated by the Fact that Petitioner Received an Honorable Discharge at the Expiration of that Enlistment and Before the Navy was Aware of the Offenses for which He was Tried.

Petitioner also urges that his honorable discharge from the enlistment in which the offenses were committed is a judgment, in the sense of *res*

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are sought to be tried during a succeeding tour of active duty, where there has been an intervening period of inactive status. Cf. Supp. 1 to Dig. Op. JAG (1912-1940), p. 10, § 359(6), citing a 1941 decision, with 5 Bull. JAG 122, § 452(1), citing a 1946 decision, without reference to the 1941 decision.

judicata, terminating the jurisdiction of a Navy court-martial to try him for such offenses. In support of this contention it is asserted that, "An honorable discharge has been determined by this court to be 'a formal, final judgment, passed by the Government upon the entire military record of a soldier, and an authoritative declaration by it, that he had left the service in a state of honor.' *United States* v. *Kelly*, 82 U. S. 34; *Ex parte Drainer*, *supra*; *In re Fong Chew Chung*, 149 F. (2d) 904; *United States* v. *Landers*, 92 U. S. 77." (Br. 31.)

None of these cases even suggests that an honorable discharge, under the circumstances of this case, is to have the effect of (a) a pardon for offenses committed in the earlier enlistment but not known to the naval authorities at the time of discharge, and (b) a shorter statute of limitations for offenses not barred by limitations at the time of discharge. It is true that in *United States* v. *Kelly*, 15 Wall. 34, 36, this Court said that:

> * * * the honorable discharge of the deserter was a formal final judgment passed by the government upon the entire military record of the soldier, and an authoritative declaration by it that he had left the service in a *status* of honor; * * *

But the *Kelly* case did not involve court-martial jurisdiction, it concerned a soldier who had deserted, who had then been restored to duty by the

commander competent to bring him to trial for desertion, and who had thereafter been honorably discharged. This Court held that, in a suit for bounty money, the United States could not go behind the discharge to show the desertion. But since the circumstances under which Kelly was restored to duty amounted to a condonation of his offense (1 Winthrop, *Military Law & Precedents* (2d ed. 1896) 406; *Manual for Courts-Martial* (1928), ¶69*b*), the same result would have followed if the Government had been permitted to go behind the discharge. Moreover, in *United States* v. *Landers*, 92 U. S. 77, where the desertion occurred after bounty money had accrued, and where the soldier's restoration to duty involved the forfeiture of all pay and allowances due or to become due, he was held not entitled to the bounty, notwithstanding that his restoration to duty was followed by an honorable discharge. Thus, as the court below noted, the later *Landers* decision shows that *United States* v. *Kelly*, *supra*, did not hold that "a discharge is equivalent to an adjudication that he had not committed any offense" (R. 227).

Ex parte Drainer, 65 F. Supp. 410 (N.D. Cal.), affirmed as *Gould* v. *Drainer*, 158 F. 2d 981 (C.A. 9), also relied upon by petitioner, simply held that Drainer's honorable discharge from the Navy precluded his trial by court-martial for desertion from a prior enlistment. Assuming that the

Drainer case gave the discharge its proper effect, there remains a crucial distinction from the instant case, for while Drainer had become a civilian, petitioner by reenlisting became a sailor again—and was a sailor when tried, which Drainer was not. As to *In re Fong Cree Chung*, 149 F. 2d 904 (C. A. 9) it simly holds that an honorable discharge should be given full weight as against the government in naturalization proceedings.

The statutes providing for honorable discharges from the Navy do not purport to confer particular rights. 34 U.S.C. 192-193. So it has been held that an honorable discharge which has been obtained by fraud or issued by mistake may be revoked. 28 Op. Atty. Gen. 170. Thus, nothing in the governing statutes requires that an honorable discharge have the effect of *res judicata* as to undetected crimes. Similarly, it is established that an honorable discharge from an enlistment does not preclude trial and punishment by a civil court for an offense committed during that enlistment which is a violation of both civil and military law. (*Neall* v. *United States*, 118 Fed. 699 (C.A. 9); *United States* v. *MacDonald*, 265 Fed. 695 (E.D. N.Y.). Why, then, should it bar trial by a court-martial with personal jurisdiction over the offender, since the offense may well have been far more detrimental to naval or military discipline than to the maintenance of the civil peace?

Furthermore, any emphasis on the nature of an *honorable* discharge, derived of course from *United States* v. *Kelly*, *supra*, ignores the fact that the Navy issues other types of discharges which, while lacking the opprobrium of dishonorable and bad-conduct discharges, illustrate that discharges generally cannot be regarded as having the purpose and result urged by petitioner. Thus, the Navy issues "general discharges" and "undesirable discharges", *Bureau of Naval Personnel Manual*, pp. 263-264. Neither of these purports to be "an authoritative declaration" that a sailor has "left the service in a status of honor", but why should an honorable discharge have some further alchemic effect as a pardon for undetected offenses?

The facts of this case illustrate perfectly why an honorable discharge cannot be treated literally as "a formal final judgment passed by the government upon the entire military record of the soldier" or sailor. *United States* v. *Kelly*, *supra*, at p. 36. In earlier times, and in much smaller military and naval forces, when a soldier served a full enlistment in a small company, or a sailor on board a single ship, an honorable discharge issued by an officer constantly present might well be so regarded. Today, when a soldier normally passes through half a dozen units before separation, or where a sailor who in all likelihood spent nearly all his entire service at sea is routinely discharged at a receiving station—a shore establishment—these

consequences do not, *in fact*, attach to an honorable discharge. It is artificial in the extreme to suggest that the United States is now estopped by an honorable discharge signed by an officer in Brooklyn in 1946 (R. 145) who obviously neither had nor could have had any knowledge of petitioner's activities while in Japanese captivity in the Philippines from 1942 to 1944. Actually, the executive officer of the Permanent Shore Patrol, Third Naval District, who signed petitioner's discharge did so on the basis of petitioner's service record which would include a statement of any convictions by a navy court. In fact, most discharges from the Navy are signed by officers who have no personal knowledge of the man's past conduct and must act solely on the basis of the service record which accompanies a naval enlisted man or officer from one duty station to another. And so here, the officer signing petitioner's honorable discharge was in no position to pass judgment upon petitioner's conduct while a prisoner of war in the Philippine Islands. Under these circumstances, it is literally true that to give an honorable discharge the exculpatory effect sought by petitioner is to constitute it both a pardon and fortuitous period of limitation for undetected offenses.

Petitioner's solicitude for the millions of Americans who have received honorable discharges from the Navy and who again might be called upon to serve (Br. p. 31) is misplaced. The men who

by their conduct have made an honorable discharge a thing of honor are not likely to welcome making of it a refuge for those who would otherwise be subject to trial by court-martial. Petitioner's construction of the two-year statute of limitations in AGN 61 as being tolled during the period a man is in civilian status is unsupported by any judicial decision or by any Navy interpretation. In any event, we are here concerned with a sailor whose naval service has been substantially continuous and as to whom there arises no question of limitations.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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DECEMBER 1948.

APPENDIX

The Articles for the Government of the Navy (34 U.S.C., 1946 ed., 1200) provide in pertinent part:

* * * * *

Article 8. *Persons to whom applicable.*

Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy—

* * * * *

Second (Cruelty).

* * * [who] is guilty of cruelty toward or oppression or maltreatment of, any person subject to his orders;

* * * * *

Article 14. *Persons to whom applicable.*

Fine and imprisonment, or such other punishment as a court-martial may adjudge, shall be inflicted upon any person in the naval service of the United States—

First (Presenting false claims).

Who presents * * * any claim against the United States * * *, knowing such claim to be false or fraudulent; or

* * * * *

Tenth (Any other fraud against United States).

> Who executes * * * any other fraud against the United States.
>
> *Eleventh (Trial of offender after discharge).*
>
> And if any person, being guilty of any of the offenses described in this article while in the naval service, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed.

* * * * * *

Section 1547 of the Revised Statutes (34 U.S.C., 1946 ed., 591) provides:

> The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations adopted in the same manner.

Article 74 of *United States Navy Regulations, 1920*, as amended, provides in pertinent part:

> (1) All general rules and regulations for the guidance of, and all other general orders and general instructions to, persons in the Naval Establishment shall be contained in the following publications:
>
> (a) Regulations for the Government of the Navy of the United States (Navy Regulations).

* * * * *

(g) Naval Courts and Boards.

* * * * *

(2) * * *

(3) The scope of the publications enumerated in the preceding paragraphs shall be:

(a) Navy Regulations: These shall include all regulations requiring the original approval of the President of the United States * * *. * * * The Navy Regulations shall be signed by the Secretary of the Navy and approved by the President of the United States.

* * * * *

(g) Naval courts and boards: This shall include both the instructions and the forms governing the procedure of naval courts and boards. The order promulgating this publication and the order for all changes that may be made therein shall be signed by the Secretary of the Navy and approved by the President of the United States.

* * * * *

(4) Orders or instructions contained in any of the publications enumerated in the two preceding paragraphs of this article shall have full force and effect for the guidance of all persons in the Naval Establishment. No other general regulations, general orders, or general instructions to the Naval Establishment shall be signed or issued by any bureau

or office under the control of the Navy Department. This provision shall not be construed as prohibiting the publication by the bureaus or offices of the Navy Department of circulars or similar publications for the dissemination of information to the service, as may be authorized by the Secretary of the Navy, but such publications shall not have force and effect as regulations * * *

U. S. GOVERNMENT PRINTING OFFICE 1943